



STATE OF ARKANSAS
**Department of Finance
and Administration**

REVENUE LEGAL COUNSEL

Post Office Box 1272, Room 2380
Little Rock, Arkansas 72203-1272
Phone: (501) 682-7030
Fax: (501) 682-7599
<http://www.state.ar.us/dfa>

September 22, 2008

Mr. David J. Shea
Office of Charge Card Management, Director
United States General Services Administration
2200 Crystal Drive
Room 500
Arlington, VA 22202
Attn: Camesha Everett

RE: Opinion No. 20080609
GSA SmartPay®2 Implementation

Dear Director Shea:

I am writing in response to your request for an opinion on the following:

We are requesting tax exemption for Federal Government purchases made under the United States General Services Administration (GSA) GSA SmartPay® charge card program. The GSA SmartPay® program provides charge card services to Federal government agencies/organizations for conducting official business. The program consists of four business lines: purchase charge cards for purchasing supplies and services to support U.S. government missions, travel charge cards for official government travel and travel related expenses, fleet charge cards for government vehicle fuel and maintenance requirements, and integrated charge cards, which combine two or more of the business lines. For most agencies/organizations, the GSA SmartPay® 2 follow-on program will be effective November 30, 2008 through November 29, 2018, and will provide charge cards issued through Citibank, JPMorgan Chase, and US Bank. However, a few agencies may begin processing transactions under the GSA SmartPay® 2 program prior to November 30, 2008.

At the inception of this program in 1998, GSA requested that states/jurisdictions/US territories provide information regarding the state tax exemptions for which GSA SmartPay® charge cards were eligible. We also requested any requirement for tax exemption certification be rescinded. Today, in preparation for GSA SmartPay® 2, we once again respectfully request your assistance in recognizing the tax exempt status of official federal government purchase, travel, fleet, and integrated charge card transactions. We also ask that you review and rescind any requirement for the U.S. Federal Government to provide tax exemption certification when a GSA SmartPay® 2 charge card is used

CONFIDENTIAL

Opinions of Revenue Legal Counsel

as the method of payment. In lieu of the administratively burdensome tax exemption certification, all GSA SmartPay® 2 charge cards can be identified by their unique prefixes and account numbers, government-designed artwork, and wording that indicates that the card is for official purchases for the U.S. Government. Card designs and account numbering structures can be accessed at www.gsa.gov/gsasmartpay and are also provided as attachments to this message for your reference. Please use this information to identify GSA SmartPay® 2 cards.

This memorandum includes a brief form for you to identify tax exemptions available in your state/jurisdiction/U.S. territory for the U.S. Federal Government, as well as any certification requirements. We ask that each state, jurisdiction, and U.S. territory complete this form and return it to the GSA SmartPay® office by June 13, 2008. All tax exemption information provided will be communicated and published on the GSA SmartPay® website for reference by government cardholders, vendors, federal agencies, and other users. Thus, we encourage you to also make this information accessible on your respective websites as appropriate.

RESPONSE

You have requested guidance regarding from which taxes a SmartPay® 2 card would be exempt. As described in your communication, there are two methods by which a SmartPay® 2 charge card will be paid – directly by the United States Government or by the individual employee who will be reimbursed by the United States Government.

Sales Tax

The “Arkansas Gross Receipts” tax, also referred to as the “Sales Tax,” is generally applicable to the sale of tangible personal property and certain enumerated services. *See* Ark. Code Ann. § 26-52-301 (Repl. 2008). The tax is computed based on the total value of compensation paid for the taxable property or service. Ark. Code Ann. § 26-52-301; *see also* Ark. Code Ann. § 25-52-103(13) (Repl. 2008).

The gross receipts or proceeds derived from sales to the United States Government are exempt from the Arkansas Gross Receipts Tax. Ark. Code Ann. § 26-52-401(5). To qualify for this exemption, the sale must be directly purchased or paid for by the United States Government. *See, e.g., United States v. New Mexico*, 455 U.S. 720 (1982). As with the prior GSA SmartPay® program, direct-billed SmartPay® 2 charge cards, referred to as Centrally Billed Accounts (CBA), would therefore be exempt from the Arkansas Gross Receipts Tax. Conversely, individually billed cards, paid by individuals who are reimbursed by the United States Government, are *not* exempt. *Cf. id.*

CONFIDENTIAL
Opinions of Revenue Legal Counsel

Lodging Tax, Hotel Occupancy Tax, Tourism Tax

The service of providing lodging accommodations to transient guests, individuals with a separate abode renting on less than a month to month basis, is also subject to an additional two percent (2%) Special Excise Tourism Tax. Ark. Code Ann. § 26-63-402 (Repl. 2008).

As with the Arkansas Gross Receipts Tax, the service of providing lodging accommodations to transient guests to the United States Government is exempt from the Special Excise Tourism Tax. *Cf.* Ark. Code Ann. §§ 26-63-104(c); and 26-52-401(5). To qualify for this exemption, the sale must be directly purchased or paid for by the United States Government. *See, e.g., United States v. New Mexico*, 455 U.S. 720 (1982). As with the prior GSA SmartPay® program, direct-billed SmartPay® 2 charge cards, referred to as Centrally Billed Accounts (CBA), would therefore be exempt from the Arkansas Gross Receipts Tax. Conversely, individually billed cards, paid by individuals who are reimbursed by the United States Government, are *not* exempt. *Cf. id.*

Fleet Tax

In referencing a “Fleet Tax,” I assume that you are referring to taxes on purchases that would be made with the GSA SmartPay® 2 Fleet charge cards.

Gasoline Taxes, Diesel Fuel Tax, Alternate Fuel Tax

Sales of fuel to the United States Government for official governmental use are exempt from the Arkansas Motor Vehicle Fuel Tax, levied by Ark. Code Ann. § 26-55-205. Ark. Code Ann. § 26-55-101(a) (Repl. 2008). Sales of special motor fuels, such as diesel or jet fuel, to the United States Government are likewise exempt from the Arkansas Special Motor Fuels Tax. Ark. Code Ann. § 26-56-201(b)(1) (Repl. 2008). The Alternate Fuel Tax also exempts sales to the federal government. Ark. Code Ann. § 26-62-201(g) (Repl. 2008).

As described above, the United States Government must directly pay for the goods to services to qualify for the tax exemption. *See, e.g., New Mexico*, 455 U.S. According to the information you provided, all SmartPay® 2 Fleet charge cards will be CBA and therefore exempt from the listed fuel taxes.

Maintenance

While Arkansas has no established “maintenance tax,” to the extent that the goods or services required for maintenance work would normally be subject to the Arkansas Gross Receipts Tax, they would be exempt as described above.

As described above, the United States Government must directly pay for the goods to services to qualify for the tax exemption. *See, e.g., New Mexico*, 455 U.S. According to the information

CONFIDENTIAL
Opinions of Revenue Legal Counsel

you provided, all SmartPay® 2 Fleet charge cards will be CBA and therefore exempt from the Arkansas Gross Receipts Tax.

Exemption Certification

The State of Arkansas does not issue exemption certificates. *See* Ark. Gross Receipts Tax Rule GR-74(A). The Department of Finance & Administration has promulgated Ark. Gross Receipts Tax Rule GR-47.1 to address the exemption for charge cards issued by the GSA.

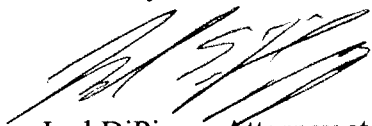
The Department of Finance & Administration will update Arkansas Gross Receipts Tax Rule GR-47.1 to include the additional prefixes utilized in the SmartPay® 2 plan. Again, there are no exemption certificates given by the State of Arkansas so no waiver of certification requirements need to be granted.

Tax Recovery Procedures

Generally, the purchaser does not have standing to request a gross receipts refund. *See* Ark. Gross Receipts Tax Rule GR-81. The taxpayer, with respect to the gross receipts tax, is the vendor of the good or service that is required to report and remit the gross receipts tax. *Id.* A taxpayer may assign his or her interest in a refund of the gross receipts tax to the purchaser in certain circumstances. *See id.* at (G). I have attached a copy of Ark. Gross Receipts Tax Rule GR-81 which sets forth the general procedures and standards for a gross receipts tax refund.

This opinion is based on my understanding of the facts as set out in your inquiry and as current Arkansas laws and rules govern those facts. Any changes in the facts or the law could result in a different opinion.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joel DiPippa', written over a horizontal line.

Joel DiPippa, Attorney at Law
Revenue Legal Counsel

Encl.

GR-81.1. REFUNDS:

A. REFUNDS OF TAX ERRONEOUSLY PAID.

1. Refunds Allowed. Any taxpayer who has paid tax in excess of the amount lawfully due is entitled to a refund of the tax erroneously paid. The claim for refund must meet the requirements of the Arkansas Tax Procedure Act. The purpose of this regulation is to clarify those requirements.

2. Refund claims may not be pursued under Ark. Code Ann. § 26-18-507 or the provisions of this regulation for the following:

a. Illegal exaction actions for which a remedy is available pursuant to Article 16, Section 13 of the Arkansas Constitution;

b. Actions arising from the issuance of a proposed assessment, jeopardy assessment, or final assessment for which a remedy is available pursuant to Ark. Code Ann. §§ 26-18-204, 26-18-405, and 26-18-406;

c. Taxes for which a refund is barred by the statute of limitations. (See Section E.)

B. DEFINITIONS

1. "Claim for Refund" shall mean:

a. An amended return that correctly reports tax that was reported incorrectly on an original return, resulting in a refund of part or all of the tax paid with the original return.

Example: Taxpayer A reports its gross receipts for the month of June, 2004 as One Hundred Thirty-two Thousand Dollars (\$132,000) and calculates its tax liability based on that amount. Taxpayer subsequently discovers that its gross receipts for June 2004 were actually One Hundred Twenty-three Thousand Dollars (\$123,000). The only information required to correct the error is a change, within the limitations period provided by law, to the gross receipts amount. Taxpayer files an amended return for June 2004 correctly reporting its gross receipts as One Hundred Twenty-three Thousand Dollars (\$123,000) and calculates the tax liability based on One Hundred Twenty-three Thousand Dollars (\$123,000). Taxpayer is entitled to a refund of the tax applicable to the Nine Thousand Dollar (\$9,000) difference in gross receipts; or

b. A verified claim for refund that requires information in addition to that required on an amended return.

Example: Taxpayer collects tax from its customer on the sale of a piece of machinery that sells for Eighty-five Thousand Dollars (\$85,000). Taxpayer reports and remits the tax on Eighty-five Thousand Dollars (\$85,000). The customer obtains an opinion that the machinery is exempt from tax as manufacturing machinery. Taxpayer refunds the tax to the customer and files a verified claim for refund that supplies the information necessary for DFA to determine whether Taxpayer is entitled to the refund claimed. (See Sections C and D regarding claim requirements.)

2. "Claimant" shall mean the person or entity that files a refund request (claim for refund). The claimant may be the taxpayer (the vendor or a direct pay permit holder), or the person or entity to whom the taxpayer has assigned its claim (assignee, usually the customer). A representative of the claimant who has been granted the Power of Attorney to act on the behalf of the claimant may submit a Claim for Refund. For a consumer use tax claim, the customer who reported and remitted consumer use tax directly to the state rather than to the vendor may file a Claim for Refund.

3. "Director" shall mean the Director of the Department of Finance and Administration, State of Arkansas or his agent.

4. "Taxpayer" shall mean:
 - a. Any person who is subject to or liable for any state tax
 - b. Any person required to file a return, to pay, or to withhold and remit any tax required by the provisions of any state tax law
 - c. Any person required to obtain a license or a permit or to keep any records under any state tax law; or
 - d. Any person who files a return and pays a reported tax without regard to whether he or she was required to file the return.
 5. "Assignee" shall mean a person or entity (usually a customer who paid tax to a vendor) to whom a taxpayer (usually a vendor) has assigned its right to a refund of tax that the taxpayer collected from the customer and reported and remitted to the state.
 6. For purposes of this regulation the terms "vendor" and "seller" shall have the same meaning and may be used interchangeably. The terms "customer" and "purchaser" shall have the same meaning and may be used interchangeably.
- C. CLAIMS FOR REFUND.
1. Who May File a Claim for Refund?
 - a. Sales or Use Tax.
 - i. The taxpayer (vendor) who collected and remitted the tax may file a refund claim, if the vendor satisfies one of the following conditions:
 - (A) The vendor has borne the tax (i.e., the vendor did not collect the tax from the customer);
 - (B) The vendor repaid the tax to the customer from whom the vendor collected the tax; or
 - (C) The customer consents to refunding the tax to the vendor.
 - ii. The assignee of a vendor (see section G).
 - iii. For use tax, a taxpayer who reported and remitted consumer use tax directly to the state rather than to the vendor.
 - iv. A holder of a direct pay permit.
 - b. Income Tax. Only a taxpayer who paid income tax may file a claim for refund. An income tax refund is claimed by filing:
 - i. an original return reporting a tax liability that is less than the amount paid through withholding and estimated payments; or
 - ii. an amended return.
 2. Requirements for Claim. Form 2004-6 is incorporated into and adopted as a part of this regulation and is required to be used by every claimant filing a claim for refund other than an amended return. The form provides a method and format to comply with the requirements for a claim for refund. The form is available on the Internet at http://www.arkansas.gov/dfa/excise_tax_v2/et_su_forms.html. The information listed below in items (a) through (f) of this section shall be required in order to process any claim for refund other than an amended return.
 - a. The Taxpayer's name and identifying tax information, including sales tax permit number, social security number or FEIN;
 - b. The date the tax was paid to the state and the tax period for which the tax was paid;

- c. The nature and kind of tax paid, such as sales tax, withholding tax, use tax, withholding tax, individual income tax, corporate income tax;
- d. The amount of tax that is claimed erroneously paid;
- e. The specific grounds upon which a refund is claimed. For example, if the claimant requests a refund based on a claim that the item purchased is exempt from tax, the information supplied should explain the specific exemption claimed, and the reasons that the item qualifies for the exemption; and
- f. Any other information relative to the payment required by the director

3. **Deficiencies in Claim.** If the director determines that the information supplied in the claim for refund substantially complies with the claim requirements, the claim will be considered to be filed timely for all periods within the statute of limitations as of the date the claim is filed. However, a refund claim that substantially complies with the claim requirements may lack additional information required by the director to process the claim. The director will send a letter to the claimant that states that the claim for refund is considered timely, explains what additional information is required, and gives the claimant a reasonable time to supply the information. If the information is not supplied within the time allowed, that part of the claim relating to the requested information will be denied.

4. **Treatment of Deficient Claims.** Any claim that does not contain the information listed in subsection (C)(2) and as required on Form 2004-6 will be considered not to be in substantial compliance with the claim requirements. The director will send a letter to the claimant stating that the claim does not meet the claim requirements. The claimant may resubmit the claim, adding the necessary information to substantially comply with the requirements. The statute of limitations shall continue to run on the refund claim until a claim is filed that substantially complies with the claim requirements. Only those taxes that are within the statute of limitations at the time a claim that is in substantial compliance with the claim requirements is submitted will be refunded. The statute of limitations will not relate back to the filing date of a prior claim that was not in substantial compliance with the claim requirements.

5. **Signature.**

a. **Claims Filed by Taxpayer.** The refund claim shall be signed by a person authorized by the taxpayer to sign tax documents.

b. **Claims Filed by Assignee of Taxpayer.** Any person who signs any document on behalf of a vendor that relates to the assignment of a vendor's right to a tax refund must certify that he or she has access to the vendor's records and can certify on behalf of the vendor that the tax has been paid.

D. **PREPARATION AND PRESENTATION OF REFUND REQUEST.** To facilitate the prompt and efficient review and analysis of refund requests, it is necessary that refund requests be presented in an orderly and understandable fashion. Toward that end, all sales and use tax refund claims should be organized as follows:

1. **Refund Claims Made by Vendors.** The most common refund request occurs when a vendor requests a refund of taxes previously remitted to the state. In these circumstances, the vendor sells the product or service, collects the tax from the customer, remits the tax to the state, and subsequently obtains information that the original transaction was not taxable or the amount of tax originally paid was incorrect. In this situation, the vendor will refund the tax to the customer and request a refund of the tax

from the state. A vendor seeking a refund under these circumstances must present documentation supporting the refund claim in the following manner:

- a. Complete Sections 1 and 2 of Form 2004-6.
- b. Attach copies of all invoices for which a refund of tax is requested.
- c. The invoices should be arranged in chronological order from the oldest invoice to the most recent.
- d. A spreadsheet or other list showing that tax was remitted to the State of Arkansas for all invoices that are included in the refund request.
- e. Provide documentation showing that:
 - i. The vendor has borne the tax (i.e., the vendor did not collect the tax from the customer but did pay the tax to the state);
 - ii. The vendor repaid the tax to the customer from whom the vendor originally collected the tax; or
 - iii. The customer consents to refunding the tax to the vendor.
- f. Any additional documentation that will assist DFA in verifying the refund claim should be attached.

2. Refund of Taxes Paid Directly by the Purchaser. In some situations, the customer is responsible for paying sales and use tax directly to the State of Arkansas. This typically occurs when a customer pays use tax on purchases made from outside the state or the purchaser holds a direct-pay sales and use tax permit. When a purchaser requests a refund of sales or use tax paid directly to the State of Arkansas, the refund claim should be organized in the following manner:

- a. Complete Sections 1 and 2 of Form 2004-6.
- b. Attach copies of all invoices for which a refund of tax is requested. These invoices should be arranged in chronological order from the oldest invoice to the most recent.
- c. A spreadsheet or other list showing that tax was remitted to the State of Arkansas for all invoices that are included in the refund request.
- d. Any additional documentation that will assist DFA in verifying the refund claim should be attached.

3. Vendor Assignment Refund Claims. Occasionally, a vendor will assign the vendor's right to a tax refund to the customer and the customer will request that DFA make a refund directly to the customer. In this circumstance, it is necessary to provide adequate safeguards to ensure that DFA refund only taxes that have actually been received by the state from the vendor. Refund claims made by customers as a result of a vendor assignment must be in the following form to provide these safeguards and to expedite processing of these refund claims:

- a. Complete Sections 1, 2, and 3 of Form 2004-6.
- b. Attach copies of all invoices for which a refund of tax is requested. The invoices should be arranged in chronological order from the oldest invoice to the most recent.
- c. If a vendor assignment refund is being requested for sales tax paid to more than one vendor, a separate Section 2 and a separate Section 3 must be included for each vendor. The total amount refunded may be summarized for all vendors on Section 1.
- d. Each vendor assigning its right to a refund must complete column 12 of Section 2 and all of Section 3.

e. Any additional documentation that will assist DFA in verifying the refund claim should be attached.

4. Requests for refund that do not include the documentation as described in this section or that are not arranged in the manner outlined in this section will be denied. However, the taxpayer will be provided additional time to correct deficiencies as provided in Section (C)(3).

E. **STATUTE OF LIMITATIONS.** The statute of limitations that applies to tax refunds is found at Ark. Code Ann. § 26-18-306. Refund claims are within the statute of limitations if they are filed within three (3) years from the date the return was filed or two (2) years from the date the tax was paid, whichever is later.

F. **PROCESSING CLAIMS FOR REFUND.**

1. Claims for refund will be processed based upon the information supplied in the claim for refund, either on the forms or otherwise included with the claim for refund.

2. The Director will process claims that substantially comply with the requirements of a claim for refund in the order received.

3. Checks that are issued to pay refunds will be mailed to the claimant's address on the claim for refund.

4. The Director will notify, in writing, claimants whose claims for refund are denied in whole that the claim, or any part, has been denied. The denial will state the basis for the denial of the claim. For remedies available upon denial of a refund, see Section I.

G. **VENDOR ASSIGNMENTS.**

1. **Refunds Made Directly to the Assignee (customer).** For sales tax, the customer is not the "taxpayer," because the customer is not liable to report and remit the tax. A customer who pays tax to a vendor should request a refund of tax erroneously paid from the vendor. After the vendor refunds the tax to the customer, the vendor can then file a claim for refund of the tax refunded to the customer. However, under the common law principles of assignment, the vendor can legally assign its right to refund to the customer (assignee).

2. **Vendor Assignment Claim Requirements**

a. The general claim for refund requirements shall apply to refund claims resulting from an assignment by a vendor of its right to refund to the customer from whom the vendor collected the tax [See subsection (C)(1).];

b. Verification by the taxpayer (vendor) that the tax claimed has been paid by the taxpayer (vendor) to the state. This verification is satisfied if both the taxpayer and the assignee satisfactorily complete Form 2004-6.

c. **Certifications of Taxpayer (vendor).** Taxpayers who assign the right to refund to an assignee should carefully read Section 3 of Form 2004-6. By signing Section 3, the taxpayer is certifying that:

i. The assignee (customer) paid the tax to the vendor;

ii. The vendor paid the tax to the state;

iii. The vendor has not previously requested or received a refund of the tax on the form;

iv. The vendor has not refunded the tax to the customer;

v. The vendor agrees not to claim a refund after assigning the claim.

3. **Right of Assignee to Refund No Greater Than Right of Taxpayer.** If the vendor would not be entitled to a refund, then its assignee is not entitled to a refund. Under

Arkansas law, an assignee of contract rights has no greater rights against the debtor than did the assignor. *Tucker v. Scarbrough*, 268 Ark. 736, 740, 596 S.W.2d 4 (1980). The confidentiality provisions of Ark. Code Ann. § 26-18-303 prohibit the Department from disclosing to the assignee facts concerning why the vendor is not entitled to a refund. If applicable, the Department will notify the claimant that the claimant must request the refund directly from the vendor.

H. ELECTRONIC RECORDS:

The age of technology has afforded many companies the ability to conduct purchasing activities in a “paperless” environment. There may be times when “paper documents” are not available and can not be included as required with the Claim for Refund. For the purposes of this rule, “paperless” will mean that a traditional “hard copy invoice or paper invoice” cannot be produced, does not exist and has not been issued from the vendor to the purchaser. When this situation occurs, the claimant is to:

1. Prepare the spreadsheet as discussed in Section 2 of the Claim for Refund packet.
2. The claimant will substitute documentation that will provide the necessary information to substantiate that tax was paid to a vendor or was accrued by the taxpayer. This information should include the date of purchase, vendor name and address, transaction tracking number used by vendor and purchaser, description of item purchased, dollar amount paid for the item purchased and the amount of tax that was accrued by the purchaser or paid to the vendor.
3. Any other information thought to be helpful by the claimant for refund verification purposes should also be submitted with the Claim for Refund.
4. The director may request additional information necessary to verify the claim for refund.

I. REMEDIES AVAILABLE TO CLAIMANT FOLLOWING DENIAL OF A CLAIM FOR REFUND.

1. Administrative hearing. The claimant has thirty (30) days following the issuance of a written denial of a claim to file a protest of the denial and request an administrative hearing. An assignee shall have the same rights to hearing that the taxpayer would have under the Arkansas Tax Procedure Act.
2. File suit in court to contest the denial. Any claimant may file suit in circuit court to contest a refund denial. The suit must be filed within one year from:
 - a. The director’s written denial of the claim for refund; or
 - b. The final decision of either the hearing board or the director on revision following an administrative hearing.
3. If the director fails to issue a refund or a written denial of the claim within six months of the date the claim is filed, the claimant may file suit in circuit court on the claim.